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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-976

TED F. DUNHAM, JR., *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Ted F. Dunham, Jr., Anderson-Dunham, Inc., Louisiana Ready-Mix Company, Inc. and Dunham Concrete Products, Inc. (hereinafter collectively referred to as petitioners) respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reversing an order of the United States District Court for the Eastern District of Louisiana granting a new trial to Ted F. Dunham, Jr. (hereinafter the individual petitioner) pursuant to 28 U.S.C. §2255 but affirming an order denying a motion for a new trial pursuant to 28 U.S.C. §1651 as to Anderson-Dunham,

Inc., Louisiana Ready-Mix Company, Inc. and Dunham Concrete Products, Inc. (hereinafter collectively referred to as the corporate petitioners).

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit of September 26, 1974 is reported officially at 501 F.2d 80. The Order and Memorandum of the District Court, filed February 4, 1974, has not been officially reported. The opinions of both courts are reproduced in Appendix A hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 26, 1974. A timely petition for rehearing which included a suggestion for rehearing *en banc* was filed on October 10, 1974 and was denied on November 13, 1974; this petition for a writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Whether a district court's order vacating judgments of conviction and sentences imposed thereon and remanding the case for a new trial upon motion pursuant to 28 U.S.C. §2255 is a non-final, interlocutory order which the court of appeals had no jurisdiction to review on appeal by the Government?

2. Whether this Court should exercise its supervisory powers to redress a miscarriage of justice where the trial

judge, upon a finding of jury confusion and probable conviction of non-existent crimes, grants a new trial pursuant to 28 U.S.C. §2255 and thereafter the Court of Appeals reverses on the ground that the jury intended to find violations different from those actually returned in its verdicts?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Title 28, United States Code, §1254
Title 28, United States Code, §2255
Title 28, United States Code, §2253
Title 28, United States Code, §1651
Title 15, United States Code, §2
Title 18, United States Code, §1951
U.S. Constitution, Amendment 5.

These provisions are reproduced in Appendix B hereto.

STATEMENT OF THE CASE.

Petitioners were indicted on a five-count indictment charging three violations of the Sherman Act, 15 U.S.C. §1, 2 and two violations of the Hobbs Act, 18 U.S.C. §1951. On February 19, 1971, petitioners were convicted in the United States District Court for the Eastern District of Louisiana, Baton Rouge Division (now the United States District Court for the Middle District of Louisiana) on two of the five counts. As reflected in the jury verdicts, petitioners were convicted of the following "offenses": "Conspiracy to attempt to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C. §2)" and "Conspiracy to attempt to extort (18 U.S.C. §1951)." The Government, the District Court, and the Court of Appeals all now agree that these are non-existent crimes, the latter

court declaring that "neither of those acts [are] denounced by law."

The District Court entered judgment,[1] althought subsequently declaring that "if I had been trying this case, I don't think that I could have found the defendants guilty."[2]

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[1] On the Sherman Act Count [Three], petitioner was fined $30,000 and sentenced to six months in prison, and on the Hobbs Act Count [Five] he was fined $10,000 and sentenced to three years with two and one-half years suspended. The prison sentences are to run consecutively. In addition, three Dunham family-owned companies were fined a total of $120,000.

[2] An official of the Teamsters Union, Edward Grady Partin, was indicted along with petitioners on all five counts of the same indictment. See *Hoffa v. United States*, 385 U.S. 293 (1966). Partin obtained a severence from petitioners. To date, Partin has been tried three times by three different United States District Judges. At the first trial, the jury was unable to reach agreement on a verdict on any of the 5 Counts and a mistrial was declared. At the second trial, the Court dismissed Count Four and the jury returned a verdict of guilty as to the remaining four Counts. Thereafter, the Court granted Partin's motion for a judgment notwithstanding the verdict on Counts One, Two and Three (the Sherman Act Counts) on the ground that the evidence was insufficient to sustain conviction on these counts. *United States v. Partin*, 1972 CCH Trade Cas. ¶73,999 (N.D. Ga. 1972). (Petitioners, as noted above, were convicted on this same Count Three.) Partin also moved for a new trial on Count Five which the Court granted because the prejudicial effect of certain evidence admitted on Count Four (which had been dismissed) was deemed to have improperly influenced the jury on Count Five. Thereafter, in the third trial, Partin was convicted on the remaining count, Count Five. (Petitioners, as noted above, were also convicted on this Count.) In reversing Partin's conviction on Count Five, the Fifth Circuit noted that without the testimony of the same two witnesses (one suffering from "auditory hallucinations" and both self-admitted perjurors) who had testified at the trial of the petitioners, "the prosecution has no case on

(continued)

The individual petitioner, along with one of the corporate petitioners (Anderson-Dunham, Inc.) appealed to the Court of Appeals, which affirmed the convictions, 475 F.2d 1241, and this Court denied certiorari, 414 U.S. 832. On June 7, 1973, the individual petitioner posted a letter of credit, as a bail bond, in the amount of $100,000.

Thereafter, the individual petitioner, pursuant to 28 U.S.C. §2255, and the corporate petitioners, pursuant to 28 U.S.C. §1651, filed motions to vacate and set aside the sentences imposed on Counts Three and Five on the grounds that petitioners had been convicted of non-existent crimes and that there were variances between the allegations of these Counts and the respective jury verdicts thereon. These issues had not previously been advanced by petitioners in the course of direct appeal.[3]

By Order and Memorandum filed February 4, 1974, the District Court (the trial judge) granted the individual petitioner's motion, pursuant to 28 U.S.C. § 2255, and ordered

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[2] (continued)
Count 5." *United States v. Partin*, 493 F.2d 750, 760 (5th Cir. 1974). Whether Partin will be retried a fourth time is unclear. In any event, it is a manifest and unconscionable miscarriage of justice to hold Dunham guilty of a conspiracy with Partin but Partin not guilty of a conspiracy with Dunham. *See generally People v. Taylor*, 117 Cal. Rptr. 70, 527 P.2d 622 (1974).

[3] Petitioners did not deliberately forego an opportunity to raise these issues on direct appeal. Rather, their significance was not perceived by counsel for petitioner during that time. However, the fact that the question whether one can be convicted for a non-existent crime was not raised on direct appeal is not a bar to collateral relief. *Davis v. United States*, 417 U.S. 333 (1974); *Kaufman v. United States*, 394 U.S. 217 (1969).

a new trial for the individual petitioner (but not the corporate petitioners)[4] on the grounds that there was substantial uncertainty as to the legal basis of the jury's verdicts because of "jury confusion" and that the patent variance between the indictment and the verdicts was aggravated by the recitation of non-existent offenses. The court's opinion should speak for itself, even at some length:

> . . . The verdict form submitted to the jury described the third count as "conspiracy to attempt to monopolize." The jury convicted the petitioner on this count. This presents the possibility that the jury, confused by the verdict form, convicted the petitioner of conspiracy to attempt rather than an attempt to monopolize by the means alleged in the charge of conspiracy. There is a significant theoretical difference between the crime of attempt (by whatever means) and the crime of conspiring to effect an illegal act. For purposes of this case, an even more important distinction between "attempt to monopolize" and "conspiracy to attempt" some illegal act is that the former is made a crime by the Sherman Antitrust Act and the latter is not. And yet it is the latter which is described in the jury verdict.
>
> These same arguments apply with equal force to petitioner's conviction under the Hobbs

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[4] Relief was denied to the corporate petitioners on the ground that the District Court believed that 28 U.S.C. §1651 did not provide a procedural vehicle to reach the merits of their claims, though they were identical to those asserted by the individual petitioner.

Act. Count 5 in the jury verdict form reads "conspiracy to attempt to extort."

The possibility that the jury convicted the petitioner of activity not constituting a crime is given more weight when it is noted that the jury could not reach a verdict on Count 2 (conspiracy to monopolize) and yet found the petitioner guilty on Count 3 as set out in the jury verdict form (conspiracy to *attempt* to monopolize). This suggests that the jury concluded that the petitioner had conspired to *attempt* an illegal activity (monopolization) but that he had not conspired to monopolize. The former activity is not made illegal by the Sherman Antitrust Act.

In any event, it appears likely that the jury thought it was convicting the petitioner of the crime of conspiracy on both counts 3 and 5, when in fact the counts in the indictments charged the crimes of atttempted monopolization and attempted extortion. The crimes of conspiracy and attempt are distinct, and thus the possibility of a variance is undeniably presented. Furthermore, Congress has not prohibited conspiracies to attempt illegal acts.

The claim that one has been convicted of and sentenced for an act which does not constitute an offense under the law is one which undeniably raises constitutional issues. It is difficult to imagine circumstances as repugnant to the principles of due process as these. When the variance between the jury

> verdict and the count as set forth in the indictment is aggravated by the fact that the verdict recites activity not constituting a crime, the burden of showing that the verdict affords a sound basis for a valid judgment rightfully lies with the government. Even though this case differs from those in which the defendant is prejudiced by the erroneous instructions of the court, the malady inflicted on the judicial process is identical: jury confusion . . .
>
> This Court finds that uncertainty as to the validity of the verdict has not been eliminated . . . Therefore, it is essential to the preservation of the due process rights of the defendant that this court eliminate the possibility that the petitioner was convicted of activity not constituting a crime.[5]

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[5] With respect to the objection that the "petitioner's counsel authored the ambiguous verdict form", the District Court's opinion stated: "It must be remembered that it was approved by the court and that it is the petitioner himself who will serve a jail sentence. At any rate, no amount of improper activity on the part of petitioner's counsel will suffice to create a federal offense where Congress has not. When events conspire to that end, justice will not be deterred by the possible existence of questionable trial tactics." Moreover, it should be noted that when trial counsel for the petitioners attempted, during the hearing on collateral relief, to explain the circumstances surrounding the construction of the verdict sheet, the Court said: "I don't want to get involved in anything like that . . . Truthfully, what occurred is over, and it is just a fact. I don't have any idea as to whatever occurred." On the other hand, contrary to the teaching of *United States v. Hayman*, 342 U.S. 205 (1952) the Court of Appeals relied on the *ex*

(continued)

On April 1, 1974, the corporate petitioners filed a notice of appeal from the denial of their motion for a new trial. On April 3, 1974, the Government filed a notice of appeal from the order granting a new trial to the individual petitioner. The individual petitioner filed a motion to docket and dismiss the Government's appeal for lack of jurisdiction on the ground that the order of a new trial was not a "final judgment" and thus non-appealable under 28 U.S.C. §2255. The Fifth Circuit consolidated the individual petitioner's motion with the appeals of the Government and the corporate petitioners for consideration on the merits.

On September 26, 1974, the Court of Appeals rendered its decision which as to the individual petitioner reversed the order of the District Court, holding that it had jurisdiction to entertain the Government's appeal and that the District Court had erred in granting the individual petitioner a new trial. As regards the corporate petitioners, the Court of Appeals (unlike the District Court) reached the merits of their claims but concluded, as it had with respect to the individual petitioner, that no new trial was warranted. 501 F.2d 80 (5th Cir. 1974). It found that the only possible meaning of "conspiracy to attempt to monopolize" was "attempt to monopolize" and "conspiracy to attempt to extort" was "attempt to extort." 501 F.2d at 84.

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[5] (continued)
parte government affidavits, which petitioners had not been permitted by the District Court to meet, for its conclusion that petitioners' counsel had authored the verdict sheet. Yet, even the Government does not contend that "any of Dunham's attorneys have engaged in a conscious plot to create error." Brief for United States as Appellant, pp. 35-36, *United States v. Dunham Concrete Products, Inc.*, 501 F.2d 80 (5th Cir. 1974).

Petitioners filed a timely petition for rehearing which contained a suggestion for rehearing *en banc;* the Court of Appeals denied the petition on November 13, 1974 with the mandate to issue on November 20, 1974. The individual petitioner filed a motion for stay of the mandate pending the filing of a petition for a writ of certiorari in this Court; the motion was opposed by the Government and denied by the Court of Appeals on December 3, 1974.

On December 10, 1974, the individual petitioner filed, with Mr. Justice Powell, an application for recall and stay of mandate pending the filing of this petition for a writ of certiorari and final disposition of this matter by this Court. That application was denied on December 13, 1974.

The individual petitioner is presently incarcerated.

REASONS FOR GRANTING THE WRIT

I. BY RULING THAT IT HAD JURISDICTION TO ENTERTAIN AN APPEAL BY THE GOVERNMENT FROM A DISTRICT COURT'S ORDER OF A NEW TRIAL, THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

The decision of the Court of Appeals is in conflict with opinions of another Circuit Court of Appeals on the issue of whether the type of order involved here is final for purposes of appellate review. Section 2255 permits appeals to be taken "as from a final judgment on application for a writ of habeas corpus." The "standards" of finality" for purposes of a Section 2255 proceeding are, of course, the same as those which this Court has followed in habeas

corpus proceedings and in cases involving direct criminal appeals. *Andrews v. United States*, 373 U.S. 334, 340 (1963).

The Second Circuit has held that, in a habeas corpus proceeding, the District Court's remand of the case for a rehearing on the challenged order is not final and not appealable. *United States v. Curran*, 18 F.2d 953 (2nd Cir. 1927); *United States v. Bishopp*, 286 F.2d 320 (2nd Cir. 1961). The court below has taken a different position, expressly declining to follow the Second Circuit if its position rests "on grounds other than the incompleteness of the habeas corpus proceeding itself." 501 F.2d at 81. The Tenth Circuit seems to be of the same view. *United States v. Kelly*, 269 F.2d 448 (10th Cir. 1959).[6]

Beginning with the *Curran* case, the Second Circuit has consistently endorsed the view that an order entered in a habeas corpus case which requires further proceedings before the original court or agency in the nature of a new trial or rehearing lacks the requisite finality for appeal. In that case, the relators, having been ordered deported, instituted

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[6] Reliance by the Court below on *Gray v. Swenson*, 430 F.2d 9 (8th Cir. 1970) is misplaced. The *Gray* case involved the appeal, not of an order granting a new trial, but rather a conditional order of discharge in a collateral proceeding. Such orders have generally been considered final for appellate jurisdiction purposes. *Edwards v. Louisiana*, 496 F.2d 904 (5th Cir. 1974); *Sexton v. Wise*, 494 F.2d 1176 (5th Cir. 1974); see *Collins v. Miller*, 252 U.S. 364, 368 (1920). *But see Stewart v. Bishop*, 403 F.2d 674 (8th Cir. 1968); *United States v. Shaughnessy*, 178 F.2d 756 (2d Cir. 1949). This case does not present the issue of whether such "conditional" orders which may not end litigation on the merits but leave more for the court to do than merely to execute the judgment (see *Stewart v. Bishop, supra*, at 678) are "final judgments" for appellate jurisdiction purposes.

habeas corpus proceedings against the Commissioner of Immigration. The District Court entered an order requiring that "they be given a rehearing" before the appropriate administrative agency, not the court. The Commissioner of Immigration's appeal was dismissed by the Second Circuit for lack of jurisdiction for reasons directly applicable to the Government's appeal here:

> An order which either discharges the writ or discharges the relator is final. This order does neither. It "sustains" the writ but remands the relators to the custody whence they came in order that a rehearing may be had. What fate has befallen them on that rehearing we do not know.

18 F.2d at 953. Nor could the Fifth Circuit here say with any more certainty what fate would befall the individual petitioner on retrial. Dunham was not discharged; upon retrial he could be convicted upon additional counts on which the jury did not agree. The Government may be better off, in the same position, or worse off than after the first trial. Thus, at worst, what the Government has sustained is immediate inconvenience, not a definitive adverse ruling. However, finality requires ultimate concrete injury, not merely the immediate inconvenience of further proceedings.

In *United States v. Bishopp, supra,* the Second Circuit adhered to its earlier expressed views on the finality question. D'Amico filed for a writ of habeas corpus following extradition proceedings. The District Court, finding that certain essential findings had not been made by the Commissioner, remanded the case to the Commissioner for further proceedings in which both sides could introduce additional evidence. Relying explicitly on this Court's decision in *Collins v. Miller,* 252 U.S. 364 (1920), the Court

held that the order was entirely non-final and non-appealable. 286 F.2d at 321. The court rejected the argument that the order of a rehearing fell within the collateral offshoot doctrine, saying "No such separate effect can be attributed to the present order." 286 F.2d at 321-22. The Fifth Circuit, however, (in rejecting petitioner's contention that no separate effect could be attributed to the order of a new trial here) distinguished this Court's holding in the *Collins* case. The Court expressly declined to follow the holding of *Bishopp* to the extent that it rested upon a contrary interpretation. 501 F.2d at 81.

Petitioner submits that *United States v. Kelly, supra,* which held appealable an order granting a new trial in a §2255 proceeding was wrongly decided. The only authority cited by the Tenth Circuit in the *Kelly* case for this proposition is *United States v. Williamson,* 255 F.2d 512 (5th Cir. 1958), *cert. denied,* 358 U.S. 941 (1959). In *Williamson,* however, the movant sought vacation of his sentence on the ground that there had been an impermissible aggregation of sentences. The District Court, vacating the sentence on one of the counts, reduced the sentence from 28 years to 8. There was nothing left for the trial court to do, so the order was in no way interlocutory.

Indeed, the *Kelly* analysis seems inconsistent with this Court's decision in *Andrews v. United States, supra.* The Government's jurisdictional argument in *Andrews* was premised on the Tenth Circuit's decision in *Kelly.* The Government, in its brief before this Court, argued:

> An Order either granting or denying the motion to set aside the judgment terminates the collateral civil proceeding and is final and appealable as such . . .

> It is, of course, true that the effect of the district court's orders granting the motions to vacate sentence was to cause the original criminal judgment to become non-final. But the orders themselves constituted the final disposition of a separate and collateral attack in a civil proceeding (under Section 2255) on the criminal sentences. Nothing more remained to be done in these collateral proceedings. Any resentencing would take place as part of the criminal proceeding reopened by the final order in the civil proceeding under 28 U.S.C. 2255. The orders of the district court were therefore reviewable at once.

Brief for the United States as Respondent, pp. 21-22, *Andrews v. United States, supra.* While the *Andrews* opinion does not explicitly repudiate *Kelly*, this Court's rejection of the Government's position based on *Kelly*, which was successfully urged on the Court below, suggests, it is submitted, that the Fifth Circuit here espouses a rule that has not been the law since 1963.

This result is particularly anomalous because of the kind of conflict that exists. Indeed, it appears that a remand for further proceedings in the same court under §2255 is a final order and appealable, whereas an order requiring further proceedings before another court or agency is not. Thus, in addition to the conflict in the circuits on this issue, the courts of appeals in *Kelly* and in this case have not followed the Congressional command that the same test of appellate jurisdiction shall apply in both habeas and Section 2255 cases.

This conflict among the circuits on the finality of new trial orders in collateral proceedings presents an important

question of Federal appellate jurisdiction warranting a review by this Court.

II. BY RULING THAT IT HAD JURISDICTION TO ENTERTAIN AN APPEAL BY THE GOVERNMENT FROM THE DISTRICT COURT'S ORDER OF A NEW TRIAL, THE COURT OF APPEALS' DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT ON THIS IMPORTANT FEDERAL QUESTION.

The Fifth Circuit rejected petitioner's contention that this Court's decision in *Andrews v. United States,* 373 U.S. 334 (1963), *Collins v. Miller,* 252 U.S. 364 (1920), and *Parr v. United States,* 351 U.S. 513 (1956) stand for the proposition that the finality and thus appealability of a §2255 order must be judged by its effect on the finality of the underlying judgment which the collateral proceeding seeks to examine. Those decisions lead to no other conclusion than that a Section 2255 order which removes the sentence and judgment in the criminal case and contemplates further proceedings in the nature of a new trial or rehearing is a non-appealable, interlocutory order.

This Court's habeas and Section 2255 decisions in which the jurisdictional issue has arisen demonstrate that the standard of finality in collateral proceedings is the same as in cases of direct appeals from criminal judgments. *Andrews v. United States, supra,* at 340. Yet, here the Court of Appeals departs from that rule.

In the instant case, the District Court's order of a new trial clearly rendered the original criminal case non-final by removing the sentence. In criminal cases, the sentence is the judgment. By requiring a new trial, the order necessitates further proceedings. Under these circumstances, the

order simply cannot be said to be final. The decision in *Andrews v. United States, supra,* where the finality of an order for resentencing under Section 2255 was involved, established that the finality of orders such as the instant one must be viewed in terms of an integration of both proceedings. Holding that the Government could not appeal from the interlocutory order that defendant be resentenced, this Court's citation to its language in *Parr v. United States, supra,* 351 U.S. at 518,[7] shows beyond doubt that *Andrews* was premised on the reasoning advanced by the individual petitioner here.

Equally persuasive that the Court of Appeals has failed to follow the decisions of this Court is the case of *Collins v. Miller, supra.* In that case, both parties appealed from an order entered in a habeas corpus proceeding. This Court *sua sponte* raised the jurisdictional issue and dismissed the case. The District Court had ordered that the relator be afforded a new hearing on two of three affidavits under which he was held for extradition. Mr. Justice Brandeis, writing for the Court, found that the order of these further proceedings *before the original trier of facts* had rendered the order non-final. As in *Collins,* where the order of a new hearing was held to divest the entire subject matter of finality, the order of a new trial here has prevented a final disposition of the case within the meaning of the final-order rule.

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[7] In the *Parr* case, this Court, at 518, found the Court of Appeals for the Fifth Circuit to be without jurisdiction to review the dismissal of one indictment following the return of another from another court saying that the indictments were to "be viewed together as parts of a single prosecution" and that "review must await the conclusion of the 'whole matter litigated.' "

For some purposes, of course, habeas corpus and §2255 proceedings are treated as separate and distinct from the criminal case under collateral review. With respect to finality, however, when further proceedings are ordered in the original trial court, the policy against piecemeal appeals should still apply. Whether a new trial or new sentence is ordered by the original trial judge or another judge, the appeal should await the final disposition of the case in the trial court. This is particularly appropriate in §2255 cases, when the collateral proceeding occurs in the same court and often, as here, before the same judge who has broad power to order a new trial or resentence. As stated in *Andrews v. United States, supra,* 373 U.S. at 339, §2255 can "be utilized to provide a more flexible remedy." When the trial judge orders a new trial there is no good reason for regarding his order as "final" when he is acting in response to a motion filed under §2255 but not otherwise.

Implicit in the Fifth Circuit's statement that the Government must "return to Square One and recommence its efforts ab initio" is the view that the inconvenience of a new trial imparts finality to the order.[8] 501 F.2d at 81-82. This Court has, however, left no doubt that even the complete inability of the Government ever to obtain review of an order does not cloak it with finality. *United States v. DiBella,* 369 U.S. 121, 130 (1962). Finality requires ultimate concrete injury, not merely the immediate

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[8] Unlike here where the Government seeks to appeal, the Fifth Circuit, relying on *Cobbledick v. United States,* 309 U.S. 323, 325 (1940), had held, where an individual was involved, that the inconvenience and hardship of a retrial has no bearing on the question of finality as a prerequisite to appeal, *United States v. Gilmore,* 264 F.2d 44, 46-47, *cert. denied,* 359 U.S. 994 (1959).

inconvenience of further proceedings. The ultimate harm to the Government is as speculative here as in *Andrews* and *DiBella;* in all three situations the Government has sustained what at the time of the appeal is immediate inconvenience, but not a definitive adverse ruling. No one can tell what the outcome will be on a retrial. Consequently, the Court of Appeals, in endowing this order with finality, has disregarded the rationale of the principle forbidding appeals until the case below is finally determined.

Thus, even apart from a conflict of decision, the question presented raises an issue important enough for determination by the Supreme Court. The problem as to the appealability of orders for new trials in habeas corpus or §2255 proceedings is one which will recur, as it has in the past. Whether the usual rule that orders for new trials are not final or appealable applies to such orders under §2255 clearly presents a question of consequence as to which there is disagreement, as the cases reviewed herein and the decision below attest.

III. IN VALIDATING THE CONVICTIONS FOR NON-EXISTENT OFFENSES, THE COURT OF APPEALS HAS SO DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Court of Appeals' ruling that a new trial was not warranted for petitioners was premised upon a rigidly formalistic and illogical analysis of the jury's verdict. The District Court, intimately familiar with the entire trial, had found jury confusion. Unable to say with assurance what

crimes the jury thought were contained in Counts Three and Five, petitioners' convictions were found to be defective. Whatever the jury found, however, it was not the verdicts as described by the Fifth Circuit.

The stated basis for the ruling of the Court of Appeals here was its belief that, in the minds of the jurors, the only possible meaning of "conspiracy to attempt to monopolize" was "attempt to monopolize" and "conspiracy to attempt to extort" was "attempt to extort," that the jury verdict must have a meaning which was not "nonsense," and that therefore the error here must have been harmless. 501 F.2d at 84.

The language of the two expressions in itself refutes the court's reasoning. On its face, a conspiracy to attempt may be less than an attempt. As part of the charge to the jury here recognized, "attempt" requires conduct having a "reasonable" or "dangerous probability" that the attempt "would succeed." Conspiracy, on the other hand, in a Sherman Act case requires only an agreement, and the jury failed to convict on Count Two which charged conspiracy to monopolize. "Conspiracy to attempt" is one degree further removed from the substantive crime than "attempt." A mere agreement to do something, or to try to do it, without more, might not be an attempt, though it might be a conspiracy or even a "conspiracy to attempt."

Thus, a jury might reasonably believe that less evidence was required for a "conspiracy to attempt to monopolize" than for an "attempt to monopolize" or "conspiracy to monopolize." Its verdict of guilty only on the items

labeled "conspiracy to attempt" is more consistent with this hypothesis than with any other.[9]

The Court of Appeals' mechanical evaluation of the jury's intent in returning the convictions on Counts Three and Five has resulted in a decision at variance with the record. There was substantial evidence supporting the District Court's conclusion that the jury could well have been confused into thinking that the two Counts contained the hybrid offenses of conspiracy to attempt. Faced with multiple instances of the interweaving of the inchoate crimes of conspiracy and attempt, it is unrealistic to suggest, as did the Court of Appeals, that a jury composed of laymen had the legal acumen to disentangle the concepts involved. Clearly, it cannot be said that the jury could not have intended to convict petitioners of the non-existent offenses described on the verdict sheet when the indictment, the evidence, and the instructions were consistent with just such a result. These indicia, not an isolated exercise in abstract logic (see 501 F.2d at 84), should have governed the decision of the Court of Appeals.

Even a cursory examination of the record manifestly refutes the Court of Appeals' conclusion as to the basis of the verdicts. For example, the instructions given by the District Court foreclose even a remote possibility that the jury conceived of Count Five as embodying a charge of attempt to extort, as stated by the Court of Appeals, 501 F.2d at 84; instead, they are a graphic prelude to the

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[9] The only convictions occurred with respect to those counts where the description of the alleged violations were defective. In sharp contrast, with respect to the remaining counts (One, Two and Four) as to which the charges were accurately described, there was an acquittal or the jury was unable to reach a verdict.

verdict of "conspiracy to attempt to extort." The Court, as a preface to its instructions on Counts Four and Five stated:

> There are two essential elements in a Hobbs Act offense: (a) an effect or potential effect on interstate commerce; (b) conspiracy to extort or a *conspiracy to an attempt to extort.* (emphasis added)

Notwithstanding such repeated intermixtures of legally discrete concepts,[10] the Court of Appeals determined that no new trial was warranted since it reasoned that there was no basis to conclude that petitioners had been convicted of the non-existent crime of conspiracy to attempt to extort.

Moreover, Count Three is not susceptible to the reasoning of the Court of Appeals. At the inception of the prosecution, petitioners moved to strike Count Three on the grounds that it charged the non-existent crime of "conspiracy to attempt to monopolize." The Government opposed this motion with the unequivocal statement "The offense charged in Count Three makes no reference to a conspiracy." The District Court agreed. And yet, despite the exorcising of conspiracy or concerted action from Count Three, the Government candidly endorsed the interweaving of attempt and conspiracy:

---

10 "Conspiracy" and "attempt" have long been denominated as inchoate offenses to distinguish them from the substantive offense that is the object of the activity encompassed by inchoate crimes. *See, e.g., Final Report, National Commission on Reform of Federal Criminal Laws* 74 (1971). (The Commission states that "the various forms of *inchoacy* dealt with in this Chapter are not to be cumulated . . ."); *Wharton Criminal Law* (11th Ed. 1912) §212 ("to make an attempt indictable it must be to commit a consumated, not an inchoate offense").

> The jurors were clearly advised that *they must find that a conspiracy was formed for the purpose of monopolizing in order to convict any defendant on Count Three* . . . .[11] (Emphasis added).

Moreover, the confusion regarding the crimes charged in the indictment is further underscored by the Government's statement at the hearing on collateral relief:

> Now, conspiracy to attempt . . . that gags me too, *but nevertheless, that is exactly what the jury intended to find* . . . . (Emphasis added).

But the Court of Appeals, eschewing the record, concluded that the jury could not have been led to believe that Counts Three and Five charged a conspiracy to attempt.

Neither the Government nor the Court of Appeals has denied that the offenses for which the jury found petitioners guilty do not exist. The holding of the Court of Appeals, reversing the District Court ruling that a man may not be convicted "for an act which does not constitute an offense under the law," sanctions a result which this Court has only recently condemned:

> If this contention is well-taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional

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[11] Brief for the United States as Appellant, p. 36, *United States v. Dunham Concrete Products, Inc.*, 501 F.2d 80 (1974).

> circumstances that justify collateral relief under §2255.

Davis v. United States, 417 U.S. 333, 346 (1974).

The Court of Appeals held that it was "satisfied beyond a reasonable doubt that the error in the wording of this form for recording the verdict did not contribute to Dunham's conviction" 501 F.2d at 84. This admits that the form of the verdict was erroneous, as the trial court had found. If the Court of Appeals meant by this that the jury could not have been influenced by the words on the verdict sheet, its finding would have been contrary to the additional facts that the trial court: (1) read the language of the verdict sheet to the jury prior to their deliberations; (2) instructed the jury to take the sheet with them into the jury room; (3) after completing deliberations, the jury submitted its verdicts to the Court on this sheet signed by the Foreman; (4) the Court then, referring to the sheet, polled the jury, individually and collectively, and all answered in the affirmative that it represented the jury's verdicts, whereupon the Court accepted it as the verdicts of the jury and filed it with the clerk. Certainly, in these circumstances it cannot be rationally said beyond a reasonable doubt that the jury's judgment was not affected by the language of the verdict sheet which was also the language of the jury verdict. Cf. *Chapman v. California*, 386 U.S. 18 (1967). Indeed, when one considers the trial court's instructions (intermingling conspiracy and attempt concepts), the conclusion is inescapable that the verdict sheet confirmed what the jury had already been told.

The District Court, admitting it had committed error at the trial, was, we submit, clearly correct in concluding that this result presented "the possibility that the jury, confused by the verdict form, convicted the petitioner of

conspiracy to attempt rather than an attempt to monopolize . . . ." The Court, having concluded that the Government (as the beneficiary of the error) had not met its burden of proving that there is no "reasonable possibility" that the error "contributed to the conviction" (*Chapman v. California, supra,* at 24), was compelled to grant petitioners a new trial. Under these circumstances, and with due respect to the Fifth Circuit, petitioners submit that no one can say, beyond a reasonable doubt, that the inaccurate descriptions of the "offenses" here involved did not *contribute* to the convictions.

On the face of the jury's verdict, the petitioners were convicted of crimes which do not exist and with which they were not charged. The decision of the court below allowing this verdict to stand is a gross departure from constitutional requirements and, thus, manifestly underscores the need for this Court to exercise its power of supervision over the administration of criminal justice in the federal courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. If this petition be granted, the individual petitioner requests that he be admitted to bail pending a final disposition of the matter by this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America, Petitioner-Appellee,

v.

DUNHAM CONCRETE PRODUCTS, INC., Louisiana Ready-Mix Company, Anderson-Dunham, Inc., Respondents-Appellants.

UNITED STATES of America, Petitioner-Appellant,

v.

Ted F. DUNHAM, Jr., Respondent-Appellee.

No. 74-1903.

United States Court of Appeals, Fifth Circuit.

Sept. 26, 1974.

In proceeding to vacate, set aside or correct sentence on charges of violating the Sherman Act and Hobbs Act, the United States District Court for the Eastern District of Louisiana at New Orleans, William D. Murray, J., sitting by designation, granted a new trial to the individual petitioner. Relief was denied to corporate petitioners. The Government appealed from the order granting a new trial to the individual petitioner and the corporate petitioners appealed from the denial of their petition. The Court of Appeals, Gee, Circuit Judge, held that order for new trial was final for purposes of appeal, and the Government had the right to appeal from such order. Where error in the wording of the form for recording verdict did not contribute to convictions, it was not ground for new trial.

Affirmed in part and reversed in part.

1. Criminal Law ⇐1024(1)

Order for new trial, granted in proceeding to vacate, set aside or correct sentence for violations of Sherman Act and Hobbs Act was final for purposes of appeal, and Government had right to appeal from such order. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; 28 U.S.C.A. § 2255; 18 U.S.C.A. § 1951.

2. Criminal Law ⇐933

Where reviewing court was satisfied beyond reasonable doubt that error in wording of form for recording verdict did not contribute to convictions, it was not ground for new trial.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, GOLDBERG and GEE, Circuit Judges.

GEE, Circuit Judge:

This is a sequel to United States of America v. Dunham Concrete Products, Inc., et al., 475 F.2d 1241 (5th Cir. 1973). In that opinion we affirmed Sherman and Hobbs Act convictions of Ted Dunham, Jr., and certain of his corporations stemming from Dunham's use of labor racketeers against persons who purchased supplies from his competitors.[1] Certiorari was denied.[2] Dunham and the corporations then filed various motions for post-conviction relief. Dunham's § 2255[3] motion was granted and a new trial ordered as to him; all corporate motions were denied. The United States appeals the Dunham order, the corporations theirs. We reverse as to Dunham and affirm as to the corporations.

1. Dunham, through the corporations, dealt in concrete products in the Baton Rouge area. By his procurement, persons who patronized his competitors suffered labor difficulties unrelated to any legitimate labor grievance, destruction of thousands of dollars worth of concrete pipe, assaults by gangs of thugs employing clubs, chains and shotguns, etc.

2. 414 U.S. 832, 94 S.Ct. 65, 38 L.Ed.2d 66 (1973).

3. 28 U.S.C. § 2255.

May the United States Appeal?

[1] Dunham questions our jurisdiction to entertain this appeal. It is said that the order granting him a new trial is not "final" in the sense required by § 2255, and that the appeal is thus piecemeal under such authorities as Andrews v. United States, 373 U.S. 334, 83 S.Ct. 1236, 10 L.Ed.2d 383 (1963); Collins v. Miller, 252 U.S. 364, 40 S.Ct. 347, 64 L.Ed. 616 (1920), and United States v. Bishopp, 286 F.2d 320 (2d Cir. 1960). And while he does not frankly avow a view that the appealability of a § 2255 order is to be determined by the finality of its effect on the underlying criminal proceeding, he does seek to find footing halfway across the abyss: finality, it is said, " . . . has meaning only in the context of the original criminal proceeding . . . . ."

We are not persuaded. The pertinent language of § 2255 runs:

> "An appeal may be taken . . . as from a final judgment on an application for a writ of habeas corpus."

This Circuit has long taken the view that § 2255 proceedings are, like habeas matters, civil actions mainly standing on their own bottoms and that when an order is entered in the § 2255 proceeding which satisfies established notions of finality, either party prejudiced may appeal as in other civil actions. United States v. Williamson, 255 F.2d 512, 515–516 (5th Cir. 1958), cert. denied 358 U.S. 941, 79 S.Ct. 348, 3 L.Ed.2d 349 (1959). What results is no more a piecemeal appeal than a § 2255 proceeding is a piecemeal trial. Other circuits have taken similar views, e. g. Gray v. Swenson, 430 F.2d 9 (8th Cir. 1970); United States v. Kelly, 269 F.2d 448 (10th Cir. 1959).

Collins is not to the contrary. It involved a single judgment in a habeas proceeding which denied the writ on one hand but granted it on two others, remanding these for further proceedings. The judgment was thus not final *for purposes of the habeas corpus proceeding* " . . . since [as the anonymous author of the headnotes correctly concludes] only one

branch of the case having been disposed of below, none of it is reviewable." Insofar as *Bishopp* may stand for a reading of *Collins* as resting on grounds other than the incompleteness of the habeas corpus proceeding itself, we decline to follow it. Nor do we view *Andrews* as contra: there the United States' attempt to appeal from a resentencing order was dismissed since, as Mr. Justice Stewart noted, " . . . there could be no final disposition *of the § 2255 proceedings* until the petitioners were resentenced." 373 U.S., at 340, 83 S.Ct., at 1240 (emphasis added). The Court notes also that, since until the petitioners are resentenced it cannot be known whether the Government is hurt, the *Andrews* situation demonstrates the basis of the rule against piecemeal appeals.

In our case the § 2255 proceedings have ended with an order requiring the Government, if it wishes to persist in an effort to punish Dunham, to return to Square One and recommence its effort ab initio. A more final termination of the § 2255 action can scarcely be imagined; what possible further purpose could it serve? We have jurisdiction.

Dunham's New Trial

[2] The district court vacated Dunham's conviction and sentences, being unable to say beyond a reasonable doubt that the jury did not convict him of non-existent crimes: "conspiracy to attempt to monopolize" and "conspiracy to attempt to extort." Neither of these acts being denounced by law, the court envisioned a want of due process in the possibility that Dunham had been sentenced for non-criminal acts. How the sentencing court found itself in such a posture may be thought to require some explanation.

The indictment of Dunham and his corporations comprised five counts. Count 1 charged conspiracy in restraint of trade (Sherman Act § 1), Counts 2 and 3 conspiracy to monopolize

and attempt to monopolize, respectively (Sherman Act § 2), and Counts 4 and 5 conspiracy to extort and an attempt to extort, respectively (Hobbs Act). In response to a motion to strike Count 3, the court ruled that it charged an attempt to monopolize and not a conspiracy to attempt to do so. The United States has taken the position that Count 5 should be similarly construed, to charge an attempt to extort. Since Counts 3 and 5 are of especial significance, we set them out so far as pertinent.[4]

4. [Count 3]

22. Beginning early in 1966, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendants and co-conspirators have attempted to monopolize the aforesaid interstate trade and commerce in violation of Section 2 of the Act of Congress of July 2, 1890 (15 U.S.C. § 2), commonly known as the Sherman Act.

23. The aforesaid attempt to monopolize has consisted of doing the acts described in paragraph 11(a) through 11(f) inclusive which are hereby incorporated in this count with the same force and effect as if here set forth in full.

[11. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to eliminate or limit competition in the sale and distribution of concrete products by concrete suppliers other than defendant concrete suppliers by:

(a) Coercing purchases of concrete products . . . .

Here follow, in subparagraphs (b) through (f), charges of various specific acts in furtherance of the conspiracy.]

[Count 5]

29. Beginning at the time of the initial stages of construction of a City Streets Sewerage Project, Plaquemine, Louisiana, on or about January, 1968, and continuing thereafter through the construction of said project, the exact dates being to the Grand Jurors unknown, in the Baton Rouge Division of the Eastern District of Louisiana and within the jurisdiction of this Court, defendants did willfully, unlawfully, and feloniously conspire and agree, each with the other, to obstruct, delay, and affect commerce, as that term is defined in Section 1951 of Title 18, United States Code, and the movement of cement and other building materials in such commerce, by attempting extortion (as defined in said section of United States Code), that is to say, said defendants attempted to obtain property in the value of the profits to be realized by defendant Anderson-Dunham, Inc., from the sale of concrete pipe to W. O. Bergeron as agent and representative of the W. O. Bergeron Construction Company, Inc., with his consent,

At trial the jury was correctly instructed, *inter alia*, that attempts to monopolize may be by concerted as well as by unilateral action, so that a member of a conspiracy to monopolize may be guilty of an attempt. American Tobacco Co. v. United States, 328 U.S. 781, 784, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946). A form for recording their verdict was also furnished them, however, which characterized Counts 3 and 5 in the precise manner of Dunham's motion to strike which the court had overruled:

> We the jury having been duly selected, empaneled, and sworn as trial jurors in the above captioned case hereby return the following verdict:
>
> **Ted F. Dunham, Jr.**
>
> | | | |
> |---|---|---|
> | Count 1—Conspiracy to restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1) | Guilty ___ | Not Guilty ___ |
> | Count 2—Conspiracy to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C. Section 2) | Guilty ___ | Not Guilty ___ |
> | Count 3—Conspiracy to attempt to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C. Section 2) | Guilty ___ | Not Guilty ___ |
> | Count 4—Conspiracy to extort (18 U.S.C. 1951) | Guilty ___ | Not Guilty ___ |
> | Count 5—Conspiracy to attempt to extort (18 U.S.C. 1951) | Guilty ___ | Not Guilty ___ |

induced by the wrongful use of fear, force and physical violence in that defendant Edward Grady Partin, acting in furtherance of the aforesaid conspiracy and agreement threatened to cause and did cause strikes, work stoppages and physical violence by members of the General Truckdrivers, Warehousemen and Helpers Local Union No. 5 at the site of the aforesaid project, unless and until such time as said W. O. Bergeron Construction Company agreed to purchase the total requirements of concrete pipe for said project from defendant Anderson-Dunham, Inc.

This form was prepared by the same counsel for Dunham who signed the motion to strike and tendered to the court at an unreported conference before the jury was instructed. Government counsel, according to affidavits in this record, remonstrated with the court, pointing out that the form adopted the erroneous construction of Count 3 which Dunham's counsel had pressed upon the court in his motion to strike and which the court had overruled, construing Count 3 to charge an attempt to monopolize. In apparent desperation, government counsel offered as a substitute "attempt to monopolize by co-conspirators." Counsel for Dunham, however, maintained his suggested form was correct. Unaccountably, the court adopted it as presented and sent it out with the jury.

Later in the day the jury advised the court, by hand note, that they had found Dunham guilty on Count 3. Asked by Dunham's counsel to instruct the jury that this "preliminary" verdict was not binding, the court did so. The jurors then submitted their verdict on the erroneous form, finding each defendant not guilty of Count 1, guilty of Counts 3 and 5, and reaching no verdict on Counts 2 and 4. No complaint was made on appeal of the form of verdict. As noted, however, after the appellate process had run its course, Dunham's counsel successfully advanced as constitutional error used by the jury of the verdict form which they had drafted, pressed upon the court over Government objection, and—in effect—forced the jury to use by the instruction about their original, handwritten verdict on Count 3.

In such a context, interesting questions of invited error[5] and deliberate by-pass of appellate remedies[6] are obviously raised. Since we are, however, satisfied beyond a reasonable

5. Even if the verdict form be viewed as part of the instructions to the jury, it might well be seen as falling within the rule of United States v. Manton, 107 F.2d 834 (2d Cir. 1939) and Johnson v. United States, 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704 (1943).

6. It is the long-settled law of this circuit that such a deliberate by-pass can bar resort to habeas on § 2255, Larson v. United States, 275 F.2d 673 (5th Cir. 1960), and that the burden of showing

doubt[7] that the error in wording of this form for recording the verdict did not contribute to Dunham's conviction, we need not attempt them. Referring to the form,[8] it is apparent that only four conceivable meanings can be ascribed to its Count 3 and Count 5 epitomes. Taking Count 3 as an example, they are:

A. Conspiracy to monopolize.

B. Conspiracy to fail to monopolize.

C. Attempt to monopolize.

D. Attempt to fail to monopolize.

Meanings B and D are nonsense; meaning A cannot have been intended since the jury was unable to agree on an answer to Count 2, which asked that precise question. Only meaning C is possible: Like reasoning applies to Count 5. We decline to construe the verdict as meaning the jury agreed on nothing or on nonsense " . . . when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face." Schneble v. Florida, 405 U.S. 427, 432, 92 S.Ct. 1056, 1059, 31 L.Ed.2d 340 (1972). As to their claims grounded in the verdict form, the appealing corporate defendants stand on no better ground than Dunham. Their other contentions, which we have carefully considered, are likewise meritless.

Insofar as the judgment below vacates the convictions and sentences of Ted F. Dunham, Jr., and grants him a new trial, it is reversed. As to the other appealing defendants, it is affirmed.

Affirmed in part, reversed in part.

absence of such a by-pass is on the petitioner. Nash v. United States, 342 F.2d 366 (5th Cir. 1965). See also Bonaparte v. Smith, 448 F.2d 385 (5th Cir. 1971) and Bowman v. Wainwright, 460 F.2d 1298 (5th Cir. 1972).

7. As required by Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

8. Which the jury may well have disregarded entirely, since its "preliminary" verdict of guilt on Count 3, at least, was returned on another paper entirely.

DISTRICT COURT'S ORDER AND MEMORANDUM

(Number and Title Omitted)

Filed: Feb. 4, 1974

On June 20, 1969, a federal grand jury, in and for the Eastern District of Louisiana, Baton Rouge Division, returned an indictment (No. 1842) against Ted F. Dunham, Jr., Dunham Concrete Products, Inc., Louisiana Ready-Mix Company, Inc., and Anderson-Dunham, Inc. Count 1 of the indictment charged a violation of Section 1 of the Sherman Act (15 U.S.C. §1), Counts 2 and 3 charged violations of Section 2 of the Sherman Act (15 U.S.C. §2), and Counts 4 and 5 charged violations of the Hobbs Act (18 U.S.C. §1951).

Counts 3 and 5 are of particular interest in the case as it presently stands before the court. Count 3 states:

> 22. Beginning early in 1966, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendants and co-conspirators have attempted to monopolize, the aforesaid interstate trade and commerce in violation of Section 2 of the Act of Congress of July 2, 1890 (15 U.S.C. §2), commonly known as the Sherman Act.
>
> 23. The aforesaid attempt to monopolize has consisted of doing the acts described in para-

graph 11(a) through 11(f) inclusive which are hereby incorporated in this count with the same force and effect as if here set forth in full.

Count 3 refers to portions of paragraph 11 of the indictment. That paragraph reads as follows:

> 11. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to eliminate or limit competition in the sale and distribution of concrete products by concrete suppliers by:
>
> (a) Coercing purchasers of concrete products to refrain from making purchases and to discontinue purchases of concrete products from concrete suppliers other than defendant concrete suppliers, by causing and threatening to cause strikes and work stoppages and destruction or damage to construction equipment at construction projects supplied with concrete products by concrete suppliers other than defendant concrete suppliers.
>
> (b) Hindering, obstructing, and delaying the performance of construction contracts by those contractors and subcontractors purchasing concrete products from concrete suppliers other than defendant concrete suppliers.
>
> (c) Causing and threatening to cause strikes and work stoppages and destruction or damage to production and delivery equipment

at suppliers of sand, gravel and other aggregates supplying aggregates to concrete suppliers other than defendant concrete suppliers.

(d) Causing and threatening to cause strikes and work stoppages and destruction or damage to production and delivery equipment at plants of concrete suppliers other than defendant concrete suppliers.

(e) Contracting to supply and supplying truckdrivers and equipment operators to concrete suppliers other than defendant concrete suppliers at wage rates and upon terms and conditions of employment less favorable than those wage rates, terms and conditions of employment extended to defendant concrete suppliers.

(f) Fixing and prescribing areas of sale and prices to be charged for concrete products by concrete suppliers.

Count 5 is constructed differently:

29. Beginning at the time of the initial stages of construction of a City Streets Sewerage Project, Plaquemine, Louisiana, on or about January, 1968, and continuing thereafter through the construction of said project, the exact dates being to the Grand Jurors unknown, in the Baton Rouge Division of the Eastern District of Louisiana and within the jurisdiction of this Court, defendants did willfully, unlaw-

fully, and feloniously conspire and agree each with the other to obstruct, delay, and affect commerce, as that term is defined in Section 1951 of Title 18, United States Code, and the movement of cement and other building materials in such commerce, by attempting extortion (as defined in said section of United States Code), that is to say, said defendants attempted to obtain property in the value of profits to be realized by defendant Anderson-Dunham, Inc. from the sale of concrete pipe to W.O. Bergeron as agent and of the W.O. Bergeron Construction Company, Inc. with his consent, induced by the wrongful use of fear, force and physical violence in that defendant Edward Grady Partin, acting in furtherance of the aforesaid conspiracy and agreement threatened to cause and did cause strikes, work stoppages and physical violence by members of the General Truckdrivers, Warehousemen and Helpers Local Union No. 5 at the site of the aforesaid project, unless and until such time as said W.O. Bergeron Construction Company agreed to purchase the total requirements of concrete pipe for said project from defendant Anderson-Dunham, Inc.

Upon arraignment, defendants Ted F. Dunham and the Dunham corporations pleaded not guilty to each of the counts and were subsequently tried before a jury in the New Orleans Division.

Order and Memorandum

Before the jury retired to consider its verdict, it was provided with a verdict form which read as follows:

Count 1 — Conspiracy to restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. §1).

Guilty____ Not Guilty____.

Count 2 — Conspiracy to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C. §2).

Guilty____ Not Guilty____.

Count 3 — Conspiracy to attempt to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C. §2).

Guilty____ Not Guilty____.

Count 4 — Conspiracy to extort (18 U.S.C. §1951).

Guilty____ Not Guilty____.

Count 5 — Conspiracy to attempt to extort (18 U.S.C. §1951).

Guilty____ Not Guilty____.

After due deliberation, the jury returned its verdicts, finding each of the Dunham defendants not guilty on Count 1 (conspiracy in restraint of trade), reporting that it was deadlocked with respect to Counts 2 and 4 (conspiracy to monopolize and conspiracy to extort) and finding all the defendants guilty on Counts 3 and

5 (conspiracy to attempt to monopolize and conspiracy to attempt to extort as described in the forms of verdict). On appeal the convictions were affirmed, and Ted F. Dunham, Jr. and the corporate defendants have submitted several motions for determination by this court, as the court which "imposed sentence." The motions of Ted Dunham and those of the corporate defendants will be treated separately.

I. Ted F. Dunham, Jr.

The motions of Ted Dunham to vacate and set aside the judgment of conviction and the sentences predicated thereon, or in the alternative, for a new trial, are made pursuant to Rule 35 of the Federal Rules of Criminal Procedure, 28 U.S.C. §2255, and the Great Writs Statute (28 U.S.C. §1651).

Two separate questions are presented by these motions. The first is whether the issues asserted in petitioner's motions are properly before the court. The second is, assuming they are, whether there has been such a denial or infringement of the constitutional rights of the defendant as to render the judgment vulnerable to collateral attack.

(A) Whether the procedural vehicles relied upon by petitioner are sufficient to properly place the substantive issues before the court.

It is clear that the petitioner's reliance on Rule 35 of the Federal Rules of Criminal Procedure is misplaced in the context of this action. Rule 35 is designed to provide relief from a sentence which is imposed subsequent to a valid conviction. An examination of the Rule and the cases decided under it clearly indicate that the purpose of the Rule is to allow reduction of a sentence upon a plea of leniency or the correction of a sentence which is in itself illegal. The nature of the Rule dictates that a motion under Rule 35 presupposes the validity of the conviction upon which the sentence is imposed. See *Cook v. United States*, 171 F.2d 467, 470 (1st Cir., 1948); 8A *Moore's Federal Practice*, pg. 35-8.

The essence of petitioner's complaint, however, is that the conviction is invalid, i.e. that the defendant was *not* convicted of a federal offense. Thus, the petitioner's argument that the sentence is illegal is necessarily based on the premise that the conviction is invalid. Rule 35 deprives the petitioner of that premise, and hence the motion is without merit. Rule 35, therefore, does not provide the proper procedural device for this type of claim.

The petitioner next relies on 28 U.S.C. §2255. In the past, Section 2255 would not have been available to the petitioner because he is not presently serving his sentence. (See *Heflin v. United States*, 358 U.S. 415 (1959). Also *Johnson v. United States*, 344 F.2d 401, 409 (5th Cir. 1965), which — contrary to petitioner's

brief — follows Heflin). The United States Supreme Court, however, recently decided that petitioners who have been released on their own recognizance are in "custody" as that word is used in the federal habeas corpus statute (28 U.S.C. §2241(c)(3) and 2254(a)). *Hensley v. Municipal Court*, 411 U.S. 345, 93 S.Ct. 1571 (1973). This court feels that the *Hensley* definition of "custody" is applicable to proceedings under Section 2255. The Supreme Court has often emphasized that 28 U.S.C. §2255 was intended to provide relief equivalent to that provided by habeas corpus.

> [T]he legislation [Section 2255] was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined. *Hill v. United States*, 368 U.S. 424, 427 (1962). See also *United States v. Hayman*, 342 U.S. 205, 219 (1952); *Kaufman v. United States*, 394 U.S. 217, 221 (1968).

The Eighth Circuit has recognized that definitions of "custody" in habeas corpus proceedings relate to the definition of "custody" as used in Section 2255. In *Jackson v. United States*, 423 F.2d 1146 (8th Cir. 1970), the petitioner challenged a federal conviction via Section 2255. The federal sentence resulting from the conviction was to run consecutively to a state sentence he was then serving. At the time of the 2255 proceeding, the prisoner had not yet begun to serve his

federal sentence. The court looked to Supreme Court definitions of "custody" in habeas corpus cases to determine whether the petitioner met the custody requirements of 2255. After citing *Peyton v. Rowe*, 391 U.S. 54 (1968), which approved habeas corpus petitions in similar situations, the Eighth Circuit stated:

> As *Hayman* and *Kaufman* make clear, the sole purpose of Section 2255 was to "minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum" (cites omitted). "Custody" under *Peyton v. Rowe*, supra, "relates to a petitioner's status for the entire duration of (his) imprisonment." Under these circumstances we think the petitioner, a state prisoner, may challenge his federal sentence although he has not yet commenced to serve that sentence. *Jackson*, supra at 1149.

The result of applying the *Hensley* definition of "custody" to proceedings under Section 2255 is that the petitioner can utilize that section even though he has not yet begun to serve his sentence.

Another hurdle remains to be cleared, however, before petitioner's reliance on Section 2255 can be deemed appropriate. It has often been stated that failure to prosecute an appeal on grounds subsequently forwarded under Section 2255 bars the court from considering the collateral attack. That rule was recently

rejected by the Supreme Court in those instances where the petitioner asserts constitutional *claims. Kaufman v. United States,* 394 U.S. 217, 223 (1968). In this case, petitioner claims that he has been deprived of due process. Therefore, the fact that the question presented was not assigned as error on appeal does not preclude the petitioner from raising it now via Section 2255.

For the foregoing reasons the motions of petitioner are properly before the court under Section 2255. It is therefore not necessary to consider whether the Great Writs Statute (28 U.S.C. §1651) provides a procedural mechanism for petitioner Ted Dunham.

(B) Whether the petitioner has suffered such an infringement of his constitutional rights as to entitle him to collateral relief under Section 2255.

Under the criterion provided by American Tobacco *Co. v. United States,* 328 U.S. 781 (1946), it appears that both the indictment and the instructions to the jury in this case were correct. *American Tobacco* clearly indicates that the proscription against attempted monopolization reaches concerted action as well as unilateral action, and that both the indictment and the instructions to the jury should make it evident that a co-conspirator can be convicted of attempted monopolization. There is nothing at all persuasive in petitioner's brief with regard to the contention that it

is impossible to find a member of a conspiracy to monopolize guilty of attempted monopolization. No cases have been cited which preclude the government from putting the factual context of the conspiracy before the jury in the indictment and during its effort to obtain a conviction for attempted monopolization. It should also be noted that the instructions approved by the Supreme Court in *American Tobacco* did not differ substantially from those given in this case. See *American Tobacco*, supra at 784.

The petitioner next contends that the jury verdict was defective. The verdict form submitted to the jury described the third count as "conspiracy to attempt to monopolize." The jury convicted the petitioner on this count. This presents the possibility that the jury, confused by the verdict form, convicted the petitioner of conspiracy to attempt rather than an attempt to monopolize by the means alleged in the charge of conspiracy. There is a significant theoretical difference between the crime of attempt (by whatever means) and the crime of conspiring to effect an illegal act. For purposes of this case, an even more important distinction between "attempt to monopolize" and "conspiracy to attempt" some illegal act is that the former is made a crime by the Sherman Anti-Trust Act and the latter is not. And yet it is the latter which is described in the jury verdict.

These same arguments apply with equal force to petitioner's conviction under the Hobbs Act. Count 5 in

the jury verdict form reads "conspiracy to attempt to extort."

The possibility that the jury convicted the petitioner of activity not constituting a crime is given more weight when it is noted that the jury could not reach a verdict on Count 2 (conspiracy to monopolize) and yet found the petitioner guilty on Count 3 as set out in the jury verdict form (conspiracy to *attempt* to monopolize). This suggests that the jury concluded that the petitioner had conspired to *attempt* an illegal activity (monopolization), but that he had not conspired to monopolize. The former activity is not made illegal by the Sherman Anti-Trust Act.

In any event, it appears likely that the jury thought it was convicting the petitioner of the crime of conspiracy on both counts 3 and 5, when in fact the counts in the indictment charged the crimes of attempted monopolization and attempted extortion. The crimes of conspiracy and attempt are distinct, and thus the possibility of a variance is undeniably presented. Furthermore, Congress has not prohibited conspiracies to attempt illegal acts.

The claim that one has been convicted of and sentenced for an act which does not constitute an offense under the law is one which undeniably raises constitutional issues. It is difficult to imagine circumstances as repugnant to the principles of due process as these. When the variance between the jury verdict and the

count as set forth in the indictment is aggravated by the fact that the verdict recites activity not constituting a crime, the burden of showing that the verdict affords a sound basis for a valid judgment rightfully lies with the government. Even though this case differs from those in which the defendant is prejudiced by the erroneous instructions of the court, the malady inflicted on the judicial process is identical: jury confusion.

In *Shelton v. United States*, 235 F.2d 951 (4th Cir. 1956), the court noted that erroneous instructions by the trial judge had created uncertainty as to whether the verdict was directed to the counts as they actually appeared in the indictment or to the counts as erroneously described. Then the court said:

> We are unable to say *beyond a reasonable doubt* what were the precise charges that the jury had in mind in announcing its conclusions. *Shelton*, supra 954. (Emphasis added).

In *Shelton*, the erroneous description came from the bench; in the case at bar, the erroneous description appeared on the verdict form which accompanied the jury to the jury room. In both instances, it is the responsibility of the government to show beyond a reasonable doubt that the verdict affords a sound basis for a valid judgment. Therefore the government must show that the verdict of the jury reflects an adequate understanding of the charges against the defendant.

This court finds that uncertainty as to the validity of the verdict has not been eliminated. Although the jury instructions were technically correct, the complexity of the law in this area readily admits the likelihood that an incorrect description of the charges appearing on a paper that was with the jury during their deliberations created confusion as to the nature of the charges against the defendant. Therefore, it is essential to the preservation of the due process rights of the defendant that this court eliminate the possibility that the petitioner was convicted of activity not constituting a crime.

Section 2255 allows for a variety of remedies. The most appropriate in this instance is a new trial. This form of relief is specifically authorized by the statute:

> [T]he court [can] vacate and set the judgment aside and shall discharge the prisoner or resentence him or *grant a new trial* or correct the sentence as may appear appropriate. (Emphasis supplied).

The government objects to granting relief on the grounds that (1) clerical errors in the verdict form are insufficient as a basis for post-conviction relief and (2) the petitioner cannot be heard to complain about a condition for which he is himself responsible. The first ground can be dismissed without serious consideration; it is clear that the petitioner is not complaining of mere "clerical errors". The second ground, al-

though more noteworthy, must also be rejected. Even though it appears that petitioner's counsel authored the ambiguous verdict form, it must be remembered that it was approved by the court and that it is the petitioner himself who will serve a jail sentence. At any rate, no amount of improper activity on the part of petitioner's counsel will suffice to create a federal offense where Congress has not. When events conspire to that end, justice will not be deterred by the possible existence of questionable trial tactics.

The judgment of conviction and the sentences imposed upon Ted Dunham are hereby vacated and a new trial is ordered.

II. The Corporate Defendants

Section 2255, like habeas corpus, was designed to provide relief for persons suffering wrongful detention. Corporations, by their very nature, do not come within the class contemplated by Congress when 28 U.S.C. §2255 was enacted. Therefore, the corporate defendants cannot utilize this section to present their complaints. Rule 35 is equally unavailable as a means to challenge the validity of the conviction, since the claims of the corporations are identical to those forwarded by Ted Dunham (See page 4 supra).

The corporate defendants next rely upon the writ of error coram nobis as preserved by the Great Writs Statute, 28 U.S.C. §1651. Two separate claims are for-

warded by means of this procedural vehicle. The court will first consider the argument that the jury verdict was defective.

At common law, a writ of error coram nobis issued only when the ground urged was an error of fact extrinsic to the record and not an error of law, when the issue had not already been considered at trial, when another remedy was not available, and when the error was not known to the court or the petitioner at the time of trial. See 18 Am.Jur.2d Coram Nobis pg 469. An exception has developed with regard to some of the requirements set forth above in those situations where the petitioner was deprived of his right to counsel. The cases dealing with this exception have noted that the usually stringent requirement that coram nobis not be used in place of a direct appeal is not applicable because the right to appeal may not provide substantial protection if counsel is not present to adequately advise the accused or to take the necessary procedural steps. This rationale is not applicable here.

The Great Writs Statute (28 U.S.C. §1651), which provides for the use of the extraordinary writs, has made the writ of error coram nobis available to the federal judiciary. However, the requirements which accompanied the use of the writ at common law are applicable to its use in the federal courts. In the case at bar, the error is one of law appearing on the record which could have been assigned as error on appeal. Since the petitioner's failure to present the error to

the Court of Appeals during the direct appeal of this case precludes them from using the writ of error coram nobis, the court need not consider the cases cited for the proposition that circumstances sufficiently extraordinary will permit suspension of the requirement that the error be factual in nature and extrinsic to the record.

It is well established that the writ of error coram nobis is not available where a proper remedy is afforded by direct appeal. See 18 Am.Jur.2d §12 n. 7. In *McDowell v. United States*, 336 F.2d 435 (6th Cir. 1964), the Sixth Circuit stated:

> Even if we could entertain this ground for reversal [i.e., the writ of error coram nobis], we would not reverse for the reason that the incompleteness of the transcript was apparent on its face and could have been corrected by counsel for appellant on the direct appeal. Appellant cannot be heard to assert, as a ground for vacating the sentence, any error that could and should have been corrected on direct appeal. *McDowell*, supra at 439.

The petitioners have cited no cases in which the writ was used to present an issue which could have been assigned as error on appeal; in fact, all cases cited by petitioners emphasize the availability of coram nobis in extraordinary situations only when there is or

was no adequate remedy. For instance, in *People v. Sadness*, 300 N.Y. 69, 89 N.E.2d 188 (1949), it is stated:

> We have also indicated that where an error of law appears on the face of the record coram nobis is not available, (cite omitted), and that the proper procedure to be adopted by a petitioner for the correction of such an error must be limited to the normal appeal. . . *People v. Sadness*, supra at 189.

In *People v. Pohl*, 23 N.Y.2d 290, 244 N.E.2d 47 (1968), also cited by petitioners, Pohl had presented his complaint as error on appeal and the New York Court of Appeals had affirmed the lower court. Subsequent to the action of the Court of Appeals, the United States Supreme Court changed the law applicable to Pohl's complaint, and he brought a writ of error coram nobis before the sentencing court. In allowing the writ, the New York court of Appeals stated:

> It is, therefore, our conclusion that in this case and, for the future, in all cases *in which the normal appellate process has been exhausted or is no longer available* (cite omitted), a defendant complaining of the prejudicial impact upon him of a co-defendant's out-of-court statements at a joint trial must seek relief by resort to a writ of error coram nobis. *Pohl*, supra at 48. (Emphasis original).

Since the petitioners have evidently chosen to bypass the remedy of direct appeal on this point, they cannot now avoid the consequences of that decision by using the writ of error coram nobis. The escape written into Section 2255 by *Kaufman*, supra, to the advantage of Ted Dunham does not exist in the ancient writ upon which the corporate defendants must rely. Therefore, it appears that no procedural mechanism now presents itself by which the corporate defendants can present their claim that the jury verdict was defective.

The petitioners next claim that the writ of error coram nobis can be used to vacate the judgment of conviction on the grounds that a prosecution witness had been hospitalized because of mental illness prior to trial.

It has been held that a writ of error coram nobis does not lie even when the prosecuting witness is insane *at the time of trial*. See *Boyd v. Smyth*, 205 N.W 522, 43 ALR 1381, 1386 (1925). In any event, even if the writ is properly used to present this contention, it is the opinion of the court that no grounds are present which warrant vacation of the judgment of conviction. At the time of trial, counsel for petitioners were fully aware that this witness, Billy Rogers, had been hospitalized for psychiatric examination, and counsel failed to further explore that information. Furthermore, in light of the admissions of Mr. Rogers while on the stand, this information appears insuffi-

ciently material to justify a new trial, since the jury was aware of the basic grounds for impeachment forwarded by the petitioners here.

The court now addresses various other motions of the petitioners. Although these motions for new trial were originally made on behalf of all the Dunham defendants, they will be considered here only with regard to the corporate defendants.

(A) Nondisclosure of *Brady* material relating to the testimony of Buddy Gill.

This motion for a new trial is based upon the assertion that petitioners were deprived of the testimony of Buddy Gill, a labor relations consultant in Baton Rouge, Louisiana. The contention is made here that the grand jury testimony of Mr. Gill indicated that he might be able to provide testimony that would rebut the evidence of the government that the Baton Rouge Industrial Contractors' Association had advised various contractors that they could avoid labor difficulties by purchasing concrete from petitioners. Petitioners place considerable weight upon the fact that Buddy Gill, in his grand jury testimony, consistently points out that Dolese Co. (another producer of concrete) was a viable option open to the contractors. In addition, there was grand jury testimony to the effect that Dolese was an honest and reliable company. Petitioners then suggest that since Dolese provided an option for purchasers of concrete, Louisiana Ready-Mix had at

least some competition and thus there was no monopoly proven.

Petitioners' motion for a new trial, based on the nondisclosure of Brady material (Gill's grand jury testimony), is premised on the assumption that the government had the burden of proving that the conspirators had effectively eliminated *all* competition. The law imposes no such obligation on the government:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in *restraint* of trade or commerce. . . is declared to be illegal. . . 15 U.S.C. §1.

And:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person, to monopolize *any part* of the trade or commerce... 15 U.S.C. §2.

The exclusion of one competitor from a field of interstate competition violates the Sherman Act per se. *International Salt Co. v. United States*, 332 U.S. 392 (1947). In that case it was stated:

> Under the law, agreements are forbidden which tend to create a monopoly, and it is immaterial that the tendency is a creeping one rather than one that proceeds at a full gal-

> lop; nor does the law await arrival at the goal before condemning the direction of the movement. *International Salt,* supra at 396.

On August 25, 1972, when dealing with petitioners' motion for a new trial, this court ruled upon this precise question. At that time the court found that it was impossible to view the grand jury testimony as exculpatory prior to trial. The court stated:

> Nothing in Gill's grand jury testimony refutes the government's contention that, through the Teamsters, Dunham and Partin had foreclosed competitive bidding from Altex. Court order dated August 25, 1972.

This was all the government had to prove to show a Sherman Act violation. Finally, the court emphasized the fact that the Schoenberg memo, which contains the very information allegedly suppressed here, was excluded from evidence by petitioners' objection that it contained hearsay, that it was irrelevant to the issues, and that it had no probative value. The same reasons relied upon by the court in its original consideration of this matter are applicable to petitioners' reassertion of these grounds at this time, and the motion for new trial based on the nondisclosure of Buddy Gill's grand jury testimony is denied.

(B) Nondisclosure of *Brady* material relating to the testimony of Billy Rogers.

This motion is also without merit. Nothing new with regard to the hospital records of Mr. Rogers has been presented by the petitioners since this court ruled on the question in August of 1972. At that time this court ruled that no suppression had taken place because the defendants were fully aware at the time of trial that Mr. Rogers had been hospitalized for psychiatric examination, and the petitioners failed to follow up or develop that information. In addition, the government had no more specific factual data at the time of trial than did the petitioners, and thus cannot be deemed to have suppressed information. Finally, in light of the extensive admissions of Billy Rogers on the stand, the jury was aware of the basic information that petitioners now contend would so substantially affect their case. Therefore, the information is not such that it justifies a new trial.

(C) Jencks Act materials relating to testimony of Wade McClanahan.

The next contention of the petitioners is that the grand jury testimony of Wade McClanahan in another case related to his testimony in the Dunham trial, and should therefore have been turned over to the defense as Jencks Act material. The Jencks Act requires that any "statements" made by a government witness which are in government possession prior to

trial, and which relate to the testimony of the witness, must be turned over to defense counsel before the government witness is placed on the stand. 18 U.S.C. §3500. Failure to do so can result in a new trial.

The defense requested the grand jury transcript during the trial. The government, contending that the testimony did not relate to the Dunham case, turned the transcript over to the court for *in camera* inspection. The court at that time evidently determined that the testimony before the grand jury did not relate to anything about which Mr. McClanahan might testify in the Dunham trial. The transcript was returned to the government in open court.

Upon re-inspection of the transcript, nothing is apparent which would discredit the earlier decision of the court. The subject of concern during the grand jury proceedings related exclusively to a conspiracy between Partin and another individual dealing with artificial restraints in the rental of heavy equipment in the Baton Rouge area. There was no mention of concrete suppliers or efforts to monopolize the concrete industry. In fact, the government attorney made special efforts to avoid the subject matter of the Dunham case. (See quote from grand jury transcript in discussion of syruping incidents, infra page 17).

The primary ground upon which the petitioners base their claim is the belief that Wade McClanahan made statements to the grand jury about the same "syrup-

ing" incidents to which he testified during the Dunham trial — and that these accounts were inconsistent. This latter contention is based on the assertion that Wade McClanahan was involved in a single "syruping" incident, and that he imputed this event to Hunt during the grand jury testimony and to Dunham during the trial.

The petitioners' contentions are patently and demonstrably without merit. If one reads the whole of the grand jury transcript, it is apparent that Mr. McClanahan's clandestine activities were far more extensive than the petitioners' memoranda indicate. The grand jury transcript indicates no less than twelve separate incidents in which McClanahan was directly involved. And none of these events had anything to do with the alleged Dunham activities. Wade McClanahan did indicate that there were separate syruping activities carried out for Mr. Dunham, but was not allowed to pursue that subject before the grand jury:

> Q Well, now, can you think of any other syruping that you did which you have not told us about, which we have not asked you about?
> A Yes, but I mean it was not concerning Triple A.
> Q Well, can you tell us about it?
> A Well, that is on Mr. Dunham's —
> Q I am not interested in that . . . (Grand jury transcript page 68).

Although the activities testified to before the grand jury were of a similar nature, there can be no doubt that they were not the same endeavors testified to at the trial. The grand jury transcript therefore does not come within the province of the Jencks Act insofar as this subject is concerned.

But even if the grand jury testimony should have been turned over to defense counsel, the error was harmless. It is well decided that harmless error under the Jencks Act does not necessitate a new trial. *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3rd Cir. 1970). If the subject-matter of the grand jury transcript had been brought out at the trial, it would clearly have strengthened the case against the petitioners by establishing Mr. McClanahan's proclivity for the type of activity about which he testified. Nothing is provided by the transcript which could possibly have weakened the evidence against the Dunham defendants.

The same is true with regard to the other closely-related grounds forwarded by the petitioners. The first of these relates to payments made to Wade McClanahan. While it appears that the grand jury transcript and the testimony at trial do overlap in this area, the error was completely harmless. The testimony at trial was substantially the same as that before the grand jury. This is also true of the final contention of the petitioners: the testimony about moving to Texas was essentially the same at trial as it was before the grand

jury. At any rate, it is difficult to imagine how either of these peripheral subjects could have substantially effected the petitioners' defense. Therefore, no new trial is justified for failure to turn Wade McClanahan's grand jury testimony over to the defense.

(D) New evidence relating to subsistence payments paid to government witnesses

Finally, petitioners' claim that new evidence has been uncovered relating to subsistence payments paid to Billy Rogers and Wade McClanahan during the trial. This contention must also be rejected.

The petitioners were aware at the time of trial that both these witnesses were under federal protective custody and that they were receiving subsistence payments. It would have been both obvious and easy for defense counsel to determine the nature of that custody and the amounts paid for subsistence if they felt such an investigation might produce something of value to them in presenting their defense. They failed to do so. In addition, the petitioners have made no showing that any irregularities existed in the subsistence payments which might tend to substantially impeach the testimony of either witness. Therefore, no new trial is warranted.

IT IS THEREFORE ORDERED and this does order that Ted F. Dunham, Jr., is hereby granted a new trial. The motions of Dunham Concrete Products, Inc., Louisiana Ready-Mix Company, Inc., and Anderson-

Dunham, Inc. are denied. The motion for reduction of sentence is also denied.

It appears to the court that this is a proper case for the judge to exercise his discretion and to step aside. While it would not be proper for me to recuse myself, I do deem myself to be excused from any further duty or responsibility in this case and will so notify the Chief Judge of the Eastern District of Louisiana at New Orleans.

Done and dated this 31st day of January, 1974.

/s/ W. D. MURRAY
W. D. Murray
Senior United States District Judge.

APPENDIX B

Constitutional Provision and Statutes Involved

Amendment V, United States Constitution

No person shall * * * be deprived of life, liberty or property, without due process of law * * *.

28 U.S.C. §2255, 62 Stat. 967

§2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judg-

ment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. §2253, 62 Stat. 967

§2253. Appeal.

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United

States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

18 U.S.C. §1951, 62 Stat. 793

§1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furthernace of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section–

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by

wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45.

28 U.S.C. §1651, 62 Stat. 944

§1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

15 U.S.C. § 2, 26 Stat. 209

§2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations,

shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

28 U.S.C. §1254, 62 Stat. 928

§1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification, the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-976

TED F. DUNHAM, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is reported at 501 F. 2d 80. The opinion of the district court (Pet. App. 9a–36a) has not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1974. A timely petition for rehearing was denied on November 13, 1974. The petition for a writ of certiorari was filed on February 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to entertain an appeal by the government from a district court order vacating a conviction and granting a new trial under 28 U.S.C. 2255.

2. Whether the court of appeals properly concluded that it was harmless error for the trial court to use a verdict form, prepared by defense counsel, which incorrectly described the offense charged.

STATUTES INVOLVED

The relevant statutes are set forth in Appendix B of the petition.

STATEMENT

On June 20, 1969, a grand jury returned a five-count indictment against two individuals—Ted F. Dunham, Jr. and Edward Grady Partin—and three corporations—Dunham Concrete Products, Inc., Louisiana Ready-Mix Company, Inc., and Anderson-Dunham, Inc. The indictment alleged violations of the Hobbs Act, 18 U.S.C. 1951, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2 (J.A. 32–47).[1]

Dunham and the corporate defendants were tried in New Orleans, Louisiana, in January and February, 1971.[2] The evidence demonstrated that by Dunham's "procurement, persons who patronized his competitors suffered labor difficulties unrelated to any legitimate

[1] "J.A." refers to the Joint Appendix filed in the court of appeals in connection with the appeals from the district court's order filed on February 4, 1974.

[2] Partin was tried separately. Partin's fourth trial is scheduled to commence on April 28, 1975.

labor grievance, destruction of thousands of dollars worth of concrete pipe, assaults by gangs of thugs employing clubs, chains and shotguns, etc." (Pet. App. 2a, n. 1).

District Judge Murray, who presided at the trial, met with counsel at the conclusion of the evidence and prior to instructing the jury. At the conference, James P. McPherson, one of petitioner Dunham's attorneys, submitted a suggested verdict form which described the counts as follows (J.A. 54–57):

> Count 1—Conspiracy to restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1);
>
> Count 2—Conspiracy to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C. Section 2);
>
> Count 3—Conspiracy to attempt to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C. Section 2);
>
> Count 4—Conspiracy to extort (18 U.S.C. 1951);
>
> Count 5—Conspiracy to attempt to extort (18 U.S.C. 1951).

One of the government attorneys objected to the description of Count Three contained in the verdict form and said it should read "attempt to monopolize" rather than "conspiracy to attempt to monopolize." Mr. McPherson argued that his form was correct. Another government attorney suggested "attempt to monopolize by co-conspirators" as an alternative (Pet. App. 7a). Judge Murray decided to use the McPherson form (Affidavits of Thomas P. Ruane and James D. Carriere, J.A. 165–168).

Judge Murray gave the jury lengthy instructions with respect to each count (J.A. 121–139). He also read the verdict form to the jury (J.A. 141). The next morning he sent the indictment to the jury and told them that any time they reached a verdict as to any defendant or any count "you may return your verdict to the court" (J.A. 143–144).

Later in the day, the jurors advised the judge that they had found Dunham guilty on Count Three (J.A. 146). When the jury returned again, defense counsel asked the court to instruct the jurors that "the preliminary verdict they sent to you in the form of a written memorandum is not a binding verdict" (J.A. 146). Judge Murray complied with this request. When the jurors submitted the verdict forms which the court had provided, Count One was marked Not Guilty, Counts Three and Five were marked Guilty, and Counts Two and Four were blank (J.A. 54–57). Petitioner Dunham was fined $30,000 and sentenced to six months' imprisonment on Count Three and was fined $10,000 and sentenced to three years' imprisonment on Count Five, with two and one-half years of that sentence suspended; the sentences of imprisonment were to run consecutively. The corporate defendants were fined a total of $120,000.

A notice of appeal was filed on behalf of all four defendants, but the appeals of Louisiana Ready-Mix and Dunham Concrete Products were dismissed for lack of prosecution. The court of appeals affirmed the convictions of Dunham and Anderson-Dunham, Inc. (475 F. 2d 1241), and this Court denied Dunham's

petition for a writ of certiorari (414 U.S. 832). None of the defendants raised any question with respect to the sufficiency of the indictment, the instructions, or the verdict form in any of the proceedings on direct appeal.

Dunham and the corporate defendants filed several motions for relief in the district court before the certiorari petition was denied. Two of those motions asserted that the convictions were invalid because the defendants had been convicted of nonexistent offenses. The district court issued an Order and Memorandum (Pet. App. 9a–36a) vacating Dunham's conviction and ordering a new trial pursuant to 28 U.S.C. 2255 and denying all of the corporate defendant's motions.

The district court rejected Dunham's contention that a concerted attempt to monopolize cannot be prosecuted as an attempt to monopolize and expressly held that "both the indictment and the instructions to the jury in this case were correct" (Pet. App. 18a). It observed, however, that the verdict form did not properly describe the offense charged in Count Three of the indictment because it speaks of "conspiracy to attempt rather than an attempt to monopolize by the means alleged in the charge of conspiracy" (Pet. App. 19a). The court said that this erroneous description "presents the possibility" that the jury was confused by the language of the verdict form and therefore convicted Dunham of "conspiracy to attempt," which does not constitute an offense under the Sherman Act (*ibid.*). The court added that the description

of Count Five in the verdict form presents the same problem (Pet. App. 19a–20a).[3]

The district court declined to set aside the convictions of the corporate defendants because Section 2255 does not provide a remedy for them and the *coram nobis* remedy is normally restricted to an error of fact which is extrinsic to the record (Pet. App. 23a–28a).

Both the government and the corporate defendants appealed to the United States Court of Appeals for the Fifth Circuit. The court of appeals reversed the district court's decision to vacate Dunham's conviction and affirmed the decision to deny relief to the corporate defendants (Pet. App. 1a–8a). It first rejected Dunham's contention that the government is not entitled to appeal a Section 2255 order which permits a retrial of the defendant (Pet. App. 3a–4a) and then concluded that the trial court's error in submitting erroneous verdict form language to the jurors was harmless beyond a reasonable doubt (Pet. App. 4a–8a).[4]

---

[3] The court rejected the government's contention that Dunham should not be permitted to rely upon errors in the verdict form language because his attorney drafted the form (Pet. App. 23a): "Even though it appears that petitioner's counsel authored the ambiguous verdict form, it must be remembered that it was approved by the court and that it is the petitioner himself who will serve a jail sentence. At any rate, no amount of improper activity on the part of petitioner's counsel will suffice to create a federal offense where Congress has not. When events conspire to that end, justice will not be deterred by the possible existence of questionable trial tactics."

[4] The government also contended that Dunham was not entitled to Section 2255 relief because he cannot rely upon errors created by his own attorney, he failed to demonstrate the absence of a deliberate by-pass of his direct appeal remedies, and

ARGUMENT

1. Because a proceeding under 28 U.S.C. 2255 is civil in nature, the losing party—even if it is the government—has a right to appeal. See *United States* v. *Williamson*, 255 F.2d 512, 515–516 (C.A. 5), certiorari denied, 358 U.S. 941; 2 Wright, *Federal Practice and Procedure*, § 601, p. 639 (1969). Indeed, petitioners do not dispute the general proposition that the government may appeal from the grant of a Section 2255 motion, but contend only that an order vacating a criminal conviction and granting a new trial is not a final order and is therefore not appealable.

Both the court below and the United States Court of Appeals for the Tenth Circuit have properly rejected this contention. See *United States* v. *Kelly*, 269 F.2d 448 (C.A. 10). An order vacating a conviction and granting a new trial is, we submit, a final order; and no useful purpose would be served by depriving the government of an opportunity to seek review of such a decision. As the court below stated (Pet. App. 3a–4a):

> * * * This Circuit has long taken the view that § 2255 proceedings are, like habeas matters, civil actions mainly standing on their own bottoms and that when an order is entered in the § 2255 proceeding which satisfies established notions of finality, either party prejudiced may appeal as in other civil actions. United States v. Williamson, 255 F.2d 512, 515–516 (5th Cir.

---

the erroneous description of the offenses in the verdict form is not a constitutional defect. The court of appeals did not decide those questions because its harmless error ruling made it unnecessary to do so (Pet. App. 7a–8a).

> 1958), cert. denied 358 U.S. 941, 79 S.Ct. 348, 3 L.Ed.2d 349 (1959). What results is no more a piecemeal appeal than a § 2255 proceeding is a piecemeal trial. Other circuits have taken similar views, e.g. Gray v. Swenson, 430 F.2d 9 (8th Cir. 1970); United States v. Kelly, 269 F.2d 448 (10th Cir. 1959).
>
> * * * * *
>
> In our case the § 2255 proceedings have ended with an order requiring the Government, if it wishes to persist in an effort to punish Dunham, to return to Square One and recommence its effort ab initio. A more final termination of the § 2255 action can scarcely be imagined; what possible further purpose could it serve? We have jurisdiction.

The decision of the court below is consistent with this Court's decision in *Andrews* v. *United States*, 373 U.S. 334. Section 2255 authorizes a district court to do one of four things: It can discharge a prisoner, or resentence him, or grant him a new trial, or correct his sentence. The district court in the *Andrews* case had not done any of those things; it had merely decided that the prisoner should be resentenced, but had not yet done so. This Court accordingly concluded that the Section 2255 proceeding had not been completed.

Nor is the decision below inconsistent with *Collins* v. *Miller*, 252 U.S. 364. *Collins* involved a single judgment in a *habeas corpus* proceeding brought by a petitioner who had been detained on three warrants of arrest based on three separate affidavits. Since the writ was denied as to one affidavit but granted and remanded for further proceedings as to the others,

this Court concluded that only one branch of the case had been finally disposed of and it was therefore non-reviewable. The *Collins* opinion expressly distinguished earlier "conditional order" cases in which the writ was granted subject to further proceedings in a different tribunal (252 U.S. at 368).

The decision below is also consistent with the procedure which traditionally has been followed in *habeas corpus* proceedings. Courts often grant substantially the same relief to state prisoners by ordering that the prisoner be discharged subject to the state's right to retry him. Such orders are routinely appealed. See, *e.g., Sheppard* v. *Maxwell*, 346 F. 2d 707 (C.A. 6), reversed on other grounds, 384 U.S. 333.

Moreover, petitioners are incorrect in alleging a conflict between the decision below and that of the Tenth Circuit in *Kelly*, on the one hand, and decisions of the United States Court of Appeals for the Second Circuit, on the other. While the Second Circuit has declined to review some conditional release orders in deportation and extradition cases (*e.g., United States* v. *Shaughnessy*, 178 F. 2d 756 (C.A. 2); *United States* v. *Bishopp*, 286 F. 2d 320 (C.A. 2)), these decisions are not applicable to a *habeas* order directing the release of a person convicted of a criminal offense subject to a retrial. See *United States ex rel Reid* v. *Richmond*, 295 F. 2d 83, 84–85 n. 2 (C.A. 2), certiorari denied *sub nom. Reid* v. *Richmond*, 368 U.S. 948. Indeed, subsequent to the Second Circuit decisions relied upon by petitioners (see *United States* v. *Curran*, 18 F. 2d 953 (C.A. 2); *United States* v. *Bishopp*, *supra*), that court has permitted appeals from a vari-

ety of conditional *habeas corpus* orders in cases involving persons who have been convicted of crimes in state courts. See, *e.g., United States ex rel Brown* v. *Smith,* 306 F. 2d 596 (C.A. 2); *United States ex rel Mitchell* v. *Follette,* 358 F. 2d 922 (C.A. 2); *United States ex rel Curtis* v. *Zelker,* 466 F. 2d 1092 (C.A. 2). Thus, the most recent Second Circuit decisions demonstrate that the Second Circuit would have reached the same result as the Fifth Circuit had the instant case been presented to it for decision. Therefore, there is no conflict between the circuits meriting the attention of this Court.[5]

2. The decision below with respect to the merits of petitioner Dunham's claim does not present any question warranting further review. The court of appeals was convinced "beyond a reasonable doubt" that the defective description of the offenses in the verdict form did not contribute to petitioner's convictions (Pet. App. 7a–8a). This is the proper standard for determining whether an error is harmless. See *Chapman* v. *California,* 386 U.S. 18; *Harrington* v. *California,* 395 U.S. 250; *Milton* v. *Wainwright,* 407 U.S. 371. Moreover, the harmless error determination here involved a particularly unusual set of circumstances, and the novel language of the verdict form is not likely to reappear in future cases.

The court of appeals correctly held that there is no reasonable possibility that the erroneous verdict form language contributed to the convictions on Counts

[5] There may be a conflict between different Second Circuit decisions in *habeas corpus* cases, but any such conflict should be resolved by that court in a *habeas* case.

Three and Five, charging attempt to monopolize and attempt to extort, respectively. The court's instructions on these counts were accurate and complete (see J.A. 121–139), and the indictment, which correctly described the offenses (J.A. 32–47), was sent to the jury room to aid the jury in its deliberations. There is no reason to believe that the jury ignored the instructions and the allegations of the offenses as set forth in the indictment, and rested the verdicts instead on the language of the verdict form. As this Court has said: "Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face." *Schneble v. Florida*, 405 U.S. 427, 431–432.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-976

TED F. DUNHAM, JR., *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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The United States Court of Appeals for the Fifth Circuit**

PETITIONERS' REPLY BRIEF

INTRODUCTION

Pursuant to Rule 24, Rules of the United States Supreme Court, petitioners submit this response to the Brief of the United States in Opposition.

ARGUMENT

I. DECISIONS ALLOWING APPEAL OF CONDITIONAL RELEASE ORDERS ARE INAPPLICABLE

To avoid both the conflict between the circuits on the finality of new trial orders in collateral proceedings and the conflict of the ruling below with decisions of this Court, the Government now, for the first time, seeks to equate the District Court's order in this case with the conditional release orders[1] involving persons who have been convicted of crimes in state courts. But the instant order in both form and substance cannot in any way be said to be a conditional order of release; it is instead an interlocutory order of a new trial. Therefore, the cases cited and relied on by the Government are wholly inapposite. Indeed, the Fifth Circuit itself recognized that a conflict might exist when it expressly declined to follow the Second Circuit's decision in *United States v. Bishopp,* 286 F.2d 320 (2d Cir. 1961).

Contrary to the Government's contention, the Second Circuit has repeatedly endorsed a view on appealability of new trial orders which is both consistent in itself and diametrically opposed to the position adopted by the Fifth Circuit. Where new trial orders have been involved, the Second Circuit has held that they are interlocutory and non-appealable in collateral proceedings. *United States v. Bishopp, supra; United States v. Curran,* 18 F.2d 953 (2d Cir. 1927). On the other hand, it has permitted appeals

---

[1] In the Petition for a Writ of Certiorari at 11 N. 6, the individual petitioner stated that the question of whether conditional orders of discharge were appealable was neither presented nor encompassed by the issue here.

from conditional orders of release which terminate the proceedings. *United States v. Smith*, 306 F.2d 596 (2d Cir. 1962); *United States v. Follette*, 358 F.2d 922 (2d Cir. 1966); *United States v. Zelker*, 466 F.2d 1092 (2d Cir. 1972). These holdings are not inconsistent – in one case the proceeding continues and in the other it terminates. A comparison of the *Smith* order with the instant order illustrates the differences. In *Smith, supra*, the order provided for the discharge of the prisoner, but stayed the release for the thirty days to enable the state to take steps for a new trial. When the state decided not to retry, the prisoner was released; the matter was terminated on the merits and the case was ripe for appeal. By contrast, the order here simply says "The judgment of conviction and the sentences imposed upon Ted Dunham are hereby vacated and a new trial is ordered." (J.A. 191). Hence, there has been no termination on the merits nor is there any provision for discharge under any circumstance.

Nowhere in the "most recent Second Circuit decisions" cited at Page 10 of the Government's Brief, do we find any basis for the Government's prediction that that Circuit "would have reached the same result as the Fifth Circuit, had the instant case been presented to it for decision."

II. THE JURY FOUND PETITIONERS GUILTY OF NON-EXISTENT OFFENSES; JUDICIAL APPROVAL AND UTILIZATION OF THE FAULTY VERDICT FORMS MAKES THE ORIGIN OF THE WORDING IRRELEVANT.

It is not disputed that the verdicts as to which the Dunham defendants were found guilty, do not describe any "offenses" denounced by Congress. The Fifth Circuit, by

undertaking to probe the minds of the jurors, concluded that the Jury really intended to find petitioners guilty of offenses different from those set forth on the verdict forms. This conclusion is squarely contradicted by the record. The trial court read the verdict to the jury and instructed it to take the forms to the jury room (J.A. 141). After deliberation, the verdicts were signed by the Foreman (J. A. 57) and filed with the clerk (J.A. 147). The court instructed (J.A. 146):

> "I think you should consult with one another right in the jury box and *advise me as to the verdict as reported on the form* is the verdict that you have finally agreed [sic]. Is that your verdict?" (emphasis added)
>
> FOREMAN & PANEL ALL SAY "YES."
>
> Again, the court said, "Mr. Clerk, read the verdict of the Jury."
>
> (Clerk reads verdict which is on file and the Jury, at the request of defendants' counsel, is polled and all 12 jurors signify in the affirmative that is their verdict.) (J.A. 147).

These facts inevitably lead to the conclusion that the verdict shown on the verdict form accurately reflected the findings of the Jury and negate a conclusion that the Jury intended to convict for different offenses.

In reversing the order for a new trial, the Court of Appeals placed great reliance, as does the Government's Brief, upon the affidavits of Messrs. Ruane and Carriere, two of Government's trial counsel, to support the claim that Dunham's trial counsel prepared the faulty verdict forms and persuaded the trial court to adopt and approve them over the objections of Government counsel, so that Dunham

must now suffer the consequences. Both that opinion[2] and the Government's Brief carefully avoid coming to grip with the trial court's own acceptance of the responsibility for the error.

Insofar as the trial court was concerned it was of no moment as to whether or not defense counsel "authored" the "ambiguous verdict form" since the Court "approved" it and "it is the petitioner himself who will serve a jail sentence." (App. 23a). Thus, that Court candidly recognized that once it adopted, approved and presented the verdict form to the Jury, that verdict form became the Court's own document, regardless of the source of the wording.

Moreover, implicit in the Court's Memorandum Opinion is the thought that irrespective of responsibility for an error of this magnitude, whether it be defense counsel's, the Court's or both,[3] Dunham should not be penalized by having to serve a jail sentence. We submit that the trial court's conclusions were correct and neither the Fifth Circuit's Opinion nor the Government's Brief have cited any precedent or reasons why those conclusions are not dispositive of the issue.

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[2] The opinion sidesteps this issue with a single sentence: "Unaccountably, the Court adopted it [the verdict form] as presented and sent it out with the jury." (App. p. 7a).

[3] Moreover, the Government itself bears heavy responsibility for the confusion. After defeating the Motion to Dismiss Count Three on the grounds that it "makes no reference to a conspiracy" nor made any mention of an "agreement" (J.A. 207-8, 58), the Government tried Count Three on a conspiracy theory (J.A. 169, 170) and the trial court, at the request of the Government, gave a "combination and conspiracy" instruction to the Jury (J.A. 128) as to that Count.

Instead, relying on the Carriere and Ruane affidavits, the Fifth Circuit Opinion and the Government's Brief seek to impose sole responsibility on Dunham's defense counsel. Petitioner submits that such affidavits should be given no weight for the following reasons:

(A) It is improper to consider *ex parte* affidavits on disputed factual issues in a Section 2255 proceeding, *United States v. Hayman*, 342 U.S. 205, 219-223 (1952), particularly where (1) the allegations of the affidavits are inconsistent with the record; and (2) opposing counsel was denied, as here, an opportunity to answer these affidavits (see, Fn. 8, p. 8 of Petition).

(B) Both affidavits, which state that Government counsel strongly objected to the proposed wording as to Count Three at an unreported conference with the Court, are inconsistent with the reported record. After the Court had read the verdict forms to the Jury and instructed the Jury to take the forms with it to the Jury room, the Court asked: "Now, are there any objections?" to which the Government responded: "No objections, Your Honor" (J. A. 141-2). Whatever was said at an unreported conference the Government did not choose to make its objection a matter of record when the Court asked if there was any objections to the verdict forms.

(C) Without questioning the veracity of affiants, we point out that the affidavits are based solely on memory and relate to an event which occurred some thirty months before the affidavits were made. After such a passage of time, the affiants even disagreed as to the date when the Judge's conference was held.

(D) Nowhere in the affidavits does the Government even claim that its counsel objected to the verdict form adopted and approved by the trial Court as to Count Five.

The Trial Court, which was intimately familiar with all of the circumstances, concluded:

> ". . . It is difficult to imagine circumstances as repugnant to the principles of due process as these. When the variance between the jury verdict and the count as set forth in the indictment is aggravated by the fact that the verdict recites activity not constituting a crime, the burden of showing that the verdict affords a sound basis for a valid judgment rightfully lies with the government." (App. 20a, 21a).

By contrast, the Fifth Circuit nullifies the foregoing conclusion by finding "that the error in wording of this form for recording the verdict did not contribute to Dunham's conviction, . . ." and second-guessing the Jury by the application of abstract logic and concluding that the Jury really intended to find violations different from those shown on the verdict sheet.

How can anyone say with assurance that the error in wording did not contribute to the conviction when the Court itself read the verdict forms to the Jury, sent the forms to the Jury room and again specifically called the forms to Jury's attention when they were reporting their findings? But even more unsupportable is the Court of Appeals' substitution of its own views in place of the actual findings of the Jury. In short, the Fifth Circuit opinion has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision (Rule 19, 1(b)).

This is particularly so, since petitioner Dunham is now incarcerated and stands convicted of having engaged in a conspiracy with Partin, but Partin is not guilty of a conspiracy with Dunham. Even if Partin is retried, as the Government indicates (Pg. 2, Government's Brief), this manifest injustice cannot be rectified insofar as the Sherman Act is concerned. A new Partin trial will in no way relate to any Sherman Act charges as Counts One, Two and Three have heretofore been dismissed as to Partin on the grounds that the evidence was insufficient to sustain a conviction.[4] *United States v. Partin*, 1972 CCH Trade Cas. ¶73,999 (N.D. Ga., 1972).

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[4] Since the Fifth Circuit has correctly noted that without the testimony of two witnesses (one suffering from "auditory hallucinations" and both self-admitted perjurers) "the prosecution has no case on Count 5" it is highly unlikely that Partin will be convicted if he is retried on Count Five, the Hobbs Act charge. *United States* v. *Partin, supra*, 493 F.2d 750, 760, 763 (5th Cir. 1974).

CONCLUSION

For the foregoing reasons petitioners request that the Petition for Writ of Certiorari be granted and that the individual petitioner be released from prison pending a final disposition of the matter by this Court.

Respectfully submitted,

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PETITIONERS' SUPPLEMENTAL MEMORANDUM

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PETITIONERS' SUPPLEMENTAL MEMORANDUM

Pursuant to Rule 24(5), Rules of the Supreme Court of the United States, petitioners submit this supplemental memorandum to inform this Court that, upon the Government's motion made April 14, 1975, the District Court, to whom the fourth trial of petitioners' alleged co-conspirator, Edward Grady Partin, had been assigned, dismissed Count Five. This was the last remaining count, as Partin had previously not been convicted on the four other counts.*

---

* While petitioners do not know why the Government (on the eve of trial) moved to dismiss the prosecution against Partin, certainly, despite the representation of the Government in its Brief in

(Continued)

Thus, petitioner Dunham is now incarcerated as being guilty of conspiring with Partin, but Partin is not guilty, nor can he be found guilty, of conspiracy with Dunham as to any of the counts in the Indictment (see Petition, p. 4 n. 2 and Petitioners' Reply, p. 8). This injustice compounds the undisputed fact that the verdicts on which petitioners stand convicted did not describe any "offenses" proscribed by Congress. Hence, petitioners have been deprived of due process of law as the result of fundamentally flawed verdicts describing two non-existent offenses of conspiracy to attempt.

CONCLUSION

For the foregoing reasons, petitioners request that the Petition for a Writ of Certiorari be granted and that the individual petitioner be released from prison pending a final disposition of the matter by this Court.

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* (Continued) Opposition (p. 2 n. 2), the facts that Partin had already been tried unsuccessfully three times on this indictment and that Partin was recently convicted by the Government in a related proceeding, may have influenced the Government in its decision.